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In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,
Petitioners,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF TEXAS, ARIZONA, AND NORTH DAKOTA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Table of Authorities ii

Interest of Amici Curiae 1

Summary of Argument 1

Argument 2

I. The Raisin Marketing Order Exacts a Taking for Which Just Compensation Is Due. 2

A. The Hornes suffered a paradigmatic or *per se* taking. 2

B. The Secretary cannot avoid the Fifth Amendment's just-compensation requirement by imposing a fine for the Hornes' resistance to an uncompensated taking. 4

II. No Government Should Be Permitted to Penalize Resistance to an Uncompensated Taking. 12

Conclusion 15

TABLE OF AUTHORITIES

Cases

Brown v. Legal Found. of Wash.,
538 U.S. 216 (2003) 4, 7

Dolan v. City of Tigard,
512 U.S. 374 (1994) 9, 11, 12

Ex parte Young,
209 U.S. 123 (1908) 6

Horne v. USDA,
133 S. Ct. 2053 (2013). 5, 6

Horne v. USDA,
750 F.3d 1128 (9th Cir. 2014). 4, 7, 8

Koontz v. St. Johns River Water Mgmt. Dist.,
133 S. Ct. 2586 (2013). 9

Lambert v. California,
355 U.S. 225 (1957) 5-6

Lingle v. Chevron U.S.A., Inc.,
544 U.S. 528 (2005) 2, 3, 8, 9, 11

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 3, 11, 12

Lucas v. S.C. Coastal Council,
505 U.S. 1003 (1992) 3, 7, 9, 10

M'Culloch v. Maryland,
17 U.S. 316 (1819). 13

Mo. Pac. Ry. Co. v. Nebraska,
217 U.S. 196 (1910) 7

Nollan v. Cal. Coastal Comm'n,
483 U.S. 825 (1987) 9, 11, 12

Pa. Coal Co. v. Mahon,
260 U.S. 393 (1922) 10, 13

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 8, 9, 10

Penn Cent. Transp. Co. v. City of New York,
438 U.S. 104 (1978) 9, 10, 11, 12

San Remo Hotel, L.P. v. City of San Francisco,
545 U.S. 323 (2005) 6

Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.,
560 U.S. 702 (2010) 6

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,
535 U.S. 302 (2002) 8

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 13

United States v. Burnison,
339 U.S. 87 (1950). 4

United States v. Comstock,
560 U.S. 126 (2010) 5

United States v. Gen. Motors Corp.,
323 U.S. 373 (1945) 2

United States v. Lopez,
514 U.S. 549 (1995) 5

United States v. Pewee Coal Co.,
341 U.S. 114 (1951) 2

United States v. Russell,
80 U.S. 623 (1871). 4

United States v. Stevens,
559 U.S. 460 (2010) 5

Village of Norwood v. Baker,
172 U.S. 269 (1898) 7, 9

Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,
473 U.S. 172 (1985) 6

Statutes and Regulations

7 C.F.R. § 906. 1

7 C.F.R. § 959. 1

7 C.F.R. § 981.52 1

7 C.F.R. § 983. 1

7 C.F.R. § 989.65 3

7 C.F.R. § 989.66 3

7 C.F.R. § 989.67 3

7 C.F.R. § 993.57 1

7 U.S.C. § 608(3)(a) 14

7 U.S.C. § 608c(2). 14

Tex. Gov't Code § 2166.055 13

Tex. Loc. Gov't Code § 561.001. 13

Tex. Parks & Wild. Code § 13.305(a). 13

Tex. Transp. Code § 224.001. 13

Constitutional Provisions

U.S. Const. amend. I. 5

U.S. Const. amend. V. 2, 3, 4, 5, 9, 12

U.S. Const. art. 1, § 8. 5

INTEREST OF AMICI CURIAE[1]

Marketing orders promulgated under the Agricultural Marketing Agreement Act of 1937 (Act) govern the production of fruits and vegetables grown on a large scale in the amici States. *See, e.g.*, 7 C.F.R. § 906 (Texas Rio Grande valley oranges and grapefruit); 7 C.F.R. § 959 (South Texas onions); 7 C.F.R. § 983 (Arizona pistachios). Any agricultural product within the scope of the Act is potentially subject to appropriation through a marketing order similar to the Raisin Marketing Order at issue here. Though that order's reserve requirement does not feature in all marketing orders under the Act, it is not unique to raisins. *See, e.g.*, 7 C.F.R. § 981.52 (almonds); 7 C.F.R. § 993.57 (prunes). Because the amici States and their citizens currently operate under marketing orders, and because additional marketing orders may issue, they have an interest in the correct resolution of the questions presented.

SUMMARY OF ARGUMENT

Under the Secretary's Raisin Marketing Order, the Hornes face a choice: part with sometimes 40% or more of their annual raisin crop without just compensation, or keep it and face fines amounting to its dollar equivalent plus additional monetary penalties. The Raisin Marketing Order is therefore a taking. This is not changed by the fact that the Hornes might retain some token interest in the proceeds left over after the government disposes of their reserved raisins, or that the Hornes are parting with a portion of their crop rather than the en-

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[1] Pursuant to Supreme Court Rule 37.4, consent of the parties is not required for the States to file this amicus brief.

tire amount. The Order works a taking for which the federal government would owe just compensation, but neither the Act nor the Order provides just compensation. The Hornes may defend against the monetary penalties sought here because they are based on the Hornes' failure to accede to an unconstitutional government action.

The Takings Clause serves as an important check on the government's eminent-domain power. The amici States, although condemnors themselves, respect the obligation imposed by the Takings Clause and seek to ensure that their own citizens—hundreds of thousands of whom work in the agricultural industry—are not threatened with and do not suffer similar uncompensated takings at the hands of the federal government.

ARGUMENT

I. The Raisin Marketing Order Exacts a Taking for Which Just Compensation Is Due.

A. The Hornes suffered a paradigmatic or *per se* taking.

"The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945)). Additionally, the Court recognizes "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes." *Id.* at 538. The first is a regulation that "requires an owner to suffer a permanent phys-

ical invasion of her property—however minor." *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The second applies to use restrictions that do not result in physical invasion but which "completely deprive an owner of 'all economically beneficial us[e]' of her property." *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992)).

The Raisin Marketing Order, which requires the Hornes to surrender a portion of their crop each year to the government or a government-designated recipient, 7 C.F.R. §§ 989.65-67, qualifies as both a paradigmatic and *per se* physical taking under the Court's precedents. First, it effects a direct government appropriation of a possessory interest in private property, *i.e.*, a "paradigmatic taking." The Order does not merely tell the Hornes how they can sell the raisins; it requires the Hornes to put the raisins in a separate location, so the government can pick them up, use them, or dispose of them as the government wishes.

Second, because the Order's regulatory burdens entail asserting possessory rights over the raisins, it is a *per se* taking rather than a use restriction. Through operation of the reserve requirement, the federal government asserts physical and permanent control of that portion of the Hornes' crop that they are required to set aside. The government "forever denies the [Hornes] any power to control the use of the property." *See Loretto*, 458 U.S. at 436.

For these reasons, the Fifth Amendment requires the federal government to provide the Hornes just compensation when it takes their raisins. It does not matter

that the Secretary does not seize the Hornes' entire crop. Permanent relinquishment of any portion of a person's property is a taking. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." (internal quotation marks and citation omitted)). Nor does it matter that the raisins are personal, rather than real, property. *See id.* at 235 (applying *per se* takings analysis to interest earned on IOLTA accounts); *United States v. Burnison*, 339 U.S. 87, 93 n.14 (1950) (taking of "personalty" requires just compensation); *United States v. Russell*, 80 U.S. 623 (1871) (seizure of steamboats).

B. The Secretary cannot avoid the Fifth Amendment's just-compensation requirement by imposing a fine for the Hornes' resistance to an uncompensated taking.

1. The Ninth Circuit emphasized that the Hornes, rather than cooperate with the Marketing Order, rebuffed the government's attempt to seize their raisins, kept and disposed of those raisins, and were fined. *See Horne v. USDA*, 750 F.3d 1128, 1138 (9th Cir. 2014) (*Horne II*) (suggesting that only regulatory-takings analysis could apply because "the government neither seized any raisins from the Hornes' land nor removed any money from the Hornes' bank account"). That reasoning is misguided. It repeats the same error that led this Court to intervene the first time.

The Hornes argue that the government has no authority to impose the monetary penalty because the Takings Clause denies the government the authority to compel them to turn over their raisins in the first place without providing just compensation. *See Horne v. USDA*, 133 S. Ct. 2053, 2061 (2013) (*Horne I*) (describing the Hornes' argument: "'assuming we are handlers, fining us for refusing to turn over reserve-tonnage raisins violates the Fifth Amendment'"). This Court has already determined that the law does not provide for such compensation through a Tucker Act suit. *Id.* at 2062 ("the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over a handler's takings claim"). So the only remaining issue is whether the Marketing Order would cause a "taking" of their raisins such that the Hornes are being punished for resisting an uncompensated taking.

The Hornes thus assert the Takings Clause as a *limit* on government action, just as defendants raise First Amendment, Commerce Clause, and Due Process Clause limits to defend against civil or criminal proceedings. *See, e.g.*, *United States v. Comstock*, 560 U.S. 126 (2010) (Commerce Clause challenge to civil-commitment action); *United States v. Stevens*, 559 U.S. 460 (2010) (First Amendment challenge to crush-video prosecution); *United States v. Lopez*, 514 U.S. 549 (1995) (Commerce Clause challenge to gun-possession prosecution); *Lam-*

bert v. California, 355 U.S. 225 (1957) (Due Process Clause challenge to felon-registration prosecution).[2]

The Hornes are not conceding that the Marketing Order is lawful and arguing that the taking is the Secretary's imposition of monetary liability for failing to turn over raisins. If the reserve program is lawful, the agency of course may impose a penalty for noncompliance. The Hornes' defense is that the Takings Clause denies the government authority to implement the raisin-reserve program at all, precisely because it provides no mechanism for paying just compensation. *See Ex parte Young*, 209 U.S. 123, 165 (1908) (although injunctive relief is available to block unconstitutional government action, "We do not say the company could not interpose [the constitutional arguments] as a defense in an action to recover penalties or upon the trial of an indictment."). The Takings Clause is thus available as a defense to es-

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[2] The Hornes' Takings Clause defense is fully ripe under Article III, despite the fact that they have not litigated a separate claim for just compensation. *Horne I*, 133 S. Ct. at 2063; *cf. Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985). In all events, if the government were to argue that the Hornes must affirmatively seek compensation through litigation, that still does not affect ripeness because the Hornes are not alleging a regulatory taking. Moreover, *Williamson County*'s state-litigation requirement is misguided. As Chief Justice Rehnquist recognized in his concurrence in the judgment in *San Remo Hotel, L.P. v. City of San Francisco*, this state-litigation requirement "has created some real anomalies," essentially closing federal courthouse doors to plaintiffs challenging regulatory takings. 545 U.S. 323, 351 (2005), quoted in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 742 (2010) (Kennedy, J., concurring in part and concurring in the judgment).

tablish that the ordered forfeiture of raisins is *ultra vires*, in the same way that other constitutional provisions may render government action invalid.

The Ninth Circuit examined the wrong doctrine. It should not have jumped to a use-restriction analysis simply because the government did not, in fact, seize raisins from the Hornes' land. *Horne II*, 750 F.3d at 1138. It should have found a taking without ever looking to the regulatory-takings doctrine described in *Lucas* because the government ordered that raisins be turned over on penalty of fines.

2. The fact that in this case the Department never obtained the raisins, but instead imposed a penalty (greater, in fact, than the market value of the crop) does not itself somehow save that order from classification as a *per se* taking. As explained, the inquiry must examine the taking actually ordered (and resisted): a taking of tangible, personal property. Nor could the practical choice presented to the Hornes—turn over their property without just compensation or pay its dollar equivalent as a penalty—justify treating the Marketing Order as something other than a paradigmatic or *per se* taking. *See Brown*, 538 U.S. at 235; *see also Mo. Pac. Ry. Co. v. Nebraska*, 217 U.S. 196, 205-08 (1910) (statute requiring company to construct additional track or pay fine challengeable as a taking); *Village of Norwood v. Baker*, 172 U.S. 269, 279 (1898) (assessment of cost of public improvement amounted to a taking "under the guise of taxation").

The Ninth Circuit disagreed, reasoning that the *per se* takings analysis did not apply because "the Hornes

[we]re not completely divested of their property rights, even with respect to the reserved raisins." *Horne II*, 750 F.3d at 1139. The court pointed to the possibility that the Hornes might receive an equitable distribution in some years, though it acknowledged that distributions were not made every year. *Id.* at 1140-41. The court also speculated about an unquantifiable benefit that the Hornes allegedly derive from the Raisin Administrative Committee's efforts to stabilize the American raisin market. *Id.* at 1141. These "token interests," however, cannot alter the basic nature of the government's action as a *per se* taking. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002) (courts "do not ask" whether a physical taking results in a total economic loss); *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001) ("Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest.").

The Ninth Circuit's reasoning misapplies this Court's takings jurisprudence. In the circuit's view, the question of what line of cases to apply turned on the fact that a monetary exaction was imposed in lieu of a physical appropriation. *Horne II*, 750 F.3d at 1138. That fact, the court concluded, required it to analyze the Marketing Order under the use-restriction rubric. *Id.*

That is wrong. The relevant question is whether the property owner would suffer a physical deprivation of his property or a permanent invasion of his property. *Lingle*, 544 U.S. at 538. If so, the property owner is entitled to just compensation. *Id.* If not, then, and only

then, should courts analyze the act as a use restriction and weigh the factors articulated in *Penn Central* to determine if a taking has occurred. *Id.* at 538-39; *see Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). As discussed above, the Marketing Order would work a possessory transfer of the Hornes' raisins. The federal government is therefore required to provide just compensation for that taking.

A hypothetical illustrates the point. If a government order instructs a land owner to either physically surrender the land to the government without just compensation or else pay a penalty, that order would manifestly qualify as a taking of the land.[3] *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013); *Village of Norwood*, 172 U.S. at 279. Even examining solely the fine, the order would not simply limit the owner's use of the property or partially diminish its value. It would amount to a penalty for exercising the Fifth Amendment right against takings of property without just compensation in return.

The Court's holdings in *Palazzolo* and *Lucas* also offer a helpful comparison. Those two cases involved use restrictions rather than physical invasions of property, but they illustrate the proper domain of use-restriction analysis. In *Palazzolo*, the landowner was subject to a regulation that *limited* his ability to develop a parcel of

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[3] This hypothetical—like this case—does not involve the "special context of land-use exactions" addressed in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). *See Lingle*, 544 U.S. at 538, 546-48.

land, but did not entirely forbid development. 533 U.S. at 630-31 ("Petitioner accepts the Council's contention and the state trial court's finding that his parcel retains $200,000 in development value under the State's wetlands regulations."). *Palazzolo* remanded the case to the state court to apply the *Penn Central* factors. *Id.* at 630. The regulation in *Lucas*, on the other hand, barred the property owner from erecting any permanent habitable structures on his land, rendering it "'valueless.'" 505 U.S. at 1007. The Court noted that in physical-takings cases, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id.* at 1015. Because no intrusion had taken place, however, the Court then went on to address the special case of use restrictions that did not interfere with ownership but which effect a total deprivation of value. *Id.* at 1015-18. In those cases, the use restriction is treated as tantamount to a *per se* taking because "it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned." *Id.* at 1017-18 (quoting *Penn Cent.*, 438 U.S. at 124; *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Neither of these cases is applicable here, however, where penalties were imposed for resisting a physical intrusion.

Even in cases where there is neither a physical invasion nor a complete deprivation of value, the Court's *Penn Central* line of regulatory-takings cases still provides an important constitutional check: it ensures that under some circumstances, property owners who do not

suffer a physical taking or a total deprivation of value resulting from a use restriction are not without a remedy. *See Lingle*, 544 U.S. at 539 (noting the Court's regulatory-taking jurisprudence "identif[ies] regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain"). Thus, individuals who have suffered something less than a physical invasion or total loss may still have recourse.

These cases also ensure that, when a regulation exacts something less than a total deprivation of value, the government's action is tied to a valid government purpose and is not overly burdensome. While "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine," *Loretto*, 458 U.S. at 432, courts examine the harm from a less-than-complete elimination of value in light of its "interfere[nce] with distinct investment-backed expectation" and "the character of the governmental action." *Penn Central*, 438 U.S. at 124.

Where there is a seizure of ownership, the Court has established a balancing test applicable *only* in the context of land-use permitting. *Nollan* and *Dolan*'s nexus and proportionality requirements ensure that the government cannot demand an interest in property unless it establishes (1) a valid government interest, (2) a nexus between the condition of the permit and the original purpose of the restriction, *Nollan*, 483 U.S. at 837, and (3) that the condition is roughly proportional "both in nature and extent to the impact of the proposed develop-

ment," *Dolan*, 512 U.S. at 391. Without these assurances, the government's action is presumed to be a bare property seizure without just compensation, the very sort of evil prohibited by the Takings Clause. *See Nollan*, 483 U.S. at 837 ("In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion." (internal quotation marks omitted)).

In all events, *Penn Central*, *Nollan*, and *Dolan* need not be considered here because the Secretary has not "simply take[n] a single 'strand' from the 'bundle' of property rights" the Hornes enjoyed in their reserved raisins; he has "chop[ped] through the bundle, taking a slice of every strand." *Loretto*, 458 U.S. at 435. Because the order to turn over raisins (or else pay their value as a fine) directs a total loss of the Hornes' reserved raisins, the federal government must pay just compensation regardless of any government interest. The reserve program fails to do so, allowing no Tucker Act claim and no other mechanism for full payment. The Order the Hornes are being penalized for resisting is thus outside the government's authority. The Hornes' Takings Clause defense is valid.

II. No Government Should Be Permitted to Penalize Resistance to an Uncompensated Taking.

Subject to the Constitution's public-use and just-compensation requirements, U.S. Const. amend. V, the amici States exercise condemnation power. They use this power to expand highways, manage flood-control efforts, provide park and recreation facilities, and pre-

serve historical sites. *See, e.g.*, Tex. Transp. Code § 224.001; Tex. Gov't Code § 2166.055; Tex. Loc. Gov't Code § 561.001; Tex. Parks & Wild. Code § 13.305(a). And while "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Mahon*, 260 U.S. at 413, the Takings Clause provides a necessary restriction on governments' ability to appropriate their citizens' private property.

The amici States recognize the importance of this restriction. From a fiscal perspective, governments would undoubtedly benefit from being relieved of the Takings Clause's just-compensation requirement. But, "[a]s Chief Justice John Marshall observed: 'The government of the Union, then, . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.'" *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995) (quoting *M'Culloch v. Maryland*, 17 U.S. 316, 404-05 (1819)). It is thus not only inconsistent with the Constitution, but also unwise as a policy matter, to evade takings claims as the federal government has done here. Governments owe their citizens a duty to protect their private property interests. And the States have an interest—indeed, an obligation—to ensure that the federal government does not penalize their citizens for failing to give up their property without just compensation.

Congress has authorized the Secretary of Agriculture to "remove from the normal channels of trade and commerce quantities of any basic agricultural commodity

or product thereof." 7 U.S.C. § 608(3)(a). Multiple agricultural commodities produced in the amici States are already subject to USDA marketing orders. *See supra* Interest of Amici Curiae. Many other agricultural commodities produced in the amici States are potentially subject to marketing orders. *See* 7 U.S.C. § 608c(2) (listing the "basic agricultural commodities" that are potentially subject to marketing orders). And while the orders currently in effect do not require producers to surrender title to their crops as the Raisin Marketing Order does, nothing prevents the Secretary from subjecting these or any other crop listed in § 608c(2) to a similar order in the future. *See* 7 U.S.C. § 608(3)(a).

To protect their citizens from unlawful government overreach, the amici States respectfully urge the Court to reverse the court of appeals' judgment and ensure that the Raisin Marketing Order does not stand as a model for evading the Takings Clause's just-compensation requirement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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